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Supreme Court, U.S.
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No. 09-1437

In the Supreme Court of the United States

ENERGY WEST, INC.,

Petitioner,

v.

DELORES TACKE,

Respondent.

On Petition for Writ of Certiorari to the Montana Supreme Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Montana Supreme Court correctly applied the abuse of discretion test to determine if the District Court erred in awarding attorneys' fees and correctly concluded the District Court conscientiously examined the evidence and did not abuse its discretion?

2. Whether the Montana Supreme Court correctly enunciated a rule for the production of contemporaneous billing records in fee-shifting cases that is for all practical purposes identical to the rule adopted by federal courts examining the issue?

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REASONS FOR DENYING THE WRIT

1. Statement of Facts and Issues

The District Court exercised conscientious judgment and discretion in evaluating the evidence before approving the attorneys' fee award to the Respondent. In reviewing that decision, the Montana Supreme Court determined the District Court did not abuse its discretion in approving the fee award. Furthermore, the Montana Supreme Court adopted a rule regarding the production of time records to determine the amount of reasonable attorney's fees. For all practical purposes, this rule is identical to the rule urged upon this Court by Petitioner in its Petition for Writ of Certiorari.

Before awarding attorneys' fees, the District Court conducted a thorough hearing. Petitioner agrees the District Court correctly used the lodestar method for calculating Respondent's attorneys' fees. In applying the lodestar method, the District Court stated it had read everything that was submitted to the Court. This included affidavits submitted by attorneys, depositions of attorneys well-versed in labor law, and importantly, a thorough review of the entire file. (Resp. App. 23b-24b). Respondent's attorneys were sworn and testified as to the number of hours reasonably expended, down to the tenth of an hour, based upon their contemporaneous billing records.

The District Court recognized it had to determine the number of hours reasonably expended. The District Court emphasized that in order to accomplish this task, it "went through the court file in detail and ferreted out the services that were rendered here on

behalf of the Plaintiff's Counsel." (Resp. App. 24b). The extent of the conscientious effort by the District Court is evidenced by its recitation of the work expended by Respondent's counsel, to-wit:

> Obviously, they began by researching and formulating and drafting a Complaint. And then, formulated and prepared extensive discovery requests; prepared several affidavits in this matter. There were motions that were researched, formulated, and drafted including summary judgment motions that went to hearing and motions in limine; multiple motions in limine, that were put together. They were obviously researching, formulating, and preparing responses to all of the Defendant's briefs, which there were several in this case and Defendant's motions in limine. There was a trial brief that was researched and drafted; a pretrial order. There was also jury instructions; and consultation with experts preparing for and presenting at the pretrial hearings in this case and post-trial hearings, which included liquidated damages hearing; and this hearing as well. In addition, there was trial preparation and - - preparation. There was a jury trial that was four days long and the time involved in conducting that jury trial. And the time for today's hearing and the post-trial proceedings that we've had as well.
>
> In regards to the type of case this involved and the time and trouble involved, obviously this case was hotly contested by Energy West.

> There was a great deal of trial preparation put into this case.

(Resp. App. 24b-25b).

The District Court characterized the work of Respondent's counsel as "above average", "substantial", "time consuming" and "necessary". The District Court further stated there was no evidence that the attorneys failed to use their time wisely. (Resp. App. 25b). In determining the appropriateness of the number of hours expended by Respondent's attorneys, the District Court noted she was familiar with the attorneys and the type of law they practiced. The District Court stated these attorneys "are probably some of the most skilled counsel that the Plaintiff could have hired to represent her in this claim." (Resp. App. 27b-28b). The District Court further stated there was no evidence the attorneys had duplicated their time or any reason to believe that the time claimed by them was not correct. (Resp. App. 28b).

The District Court Judge handled this case from start to finish. She was therefore, personally familiar with the case and the work performed by the attorneys. The District Court noted she sat through all pretrial matters and the trial itself. Based upon the foregoing, she concluded she had sufficient evidence to determine the requested hours were reasonable. (Resp. App. 29b).

The District Court Judge exercised her independent judgment in determining the rate of hourly attorneys' fees. The District Court reduced the hourly rate claimed by Respondent's attorneys. Respondent

requested attorneys' fees in the amount of $250 per hour. Petitioner argued for the hourly rate of $200 to $220. The District Court granted attorneys' fees in the amount of $225 per hour.

The Montana Supreme Court reviewed this issue and unanimously concluded, "The District Court conducted a careful review of the fee issue and we conclude that it exercised conscientious judgment and did not clearly err in evaluating the evidence or abuse its discretion in approving the fee award." (Pet. App. 18a). After a careful review of the case law requiring the necessity of providing contemporaneous billing records, the Montana Supreme Court stated, "... we strongly urge counsel to keep and provide contemporaneous time records in support of attorneys' fees requests in fee-shifting cases, and we encourage district courts to look askance at requests not so supported." (Pet. App. 18a-19a).

Respondent has requested attorneys' fees for the appeal to the Montana Supreme Court. In support of that request, Respondent has submitted to the District Court and counsel, contemporaneous billing records in compliance with this Montana Supreme Court Opinion.

2. **The Petition Identifies No Conflict in the Lower Courts That Is Appropriate for Review.**

   A. The Montana Supreme Court correctly applied the abuse of discretion test to determine if the District Court erred in awarding attorneys' fees and correctly concluded the District Court conscientiously

examined the evidence and did not abuse its discretion.

The FLSA provides that "[t]he court in such action . . . shall allow a reasonable attorney's fee to be paid by the [employer] . . . ." 29 U.S.C. §216(b). In interpreting this section, appellate courts have stated that "district courts have broad discretion in making attorney's fee awards." *Vocca v. Playboy Hotel of Chicago, Inc.*, 686 F.2d 605, ___ (7th Cir. 1982); *see also, Perdue v. Kenny A.*, ___ U.S. ___, ___, 130 S.Ct. 1662, ___, 176 L.Ed.2d 494 (2010). The role of the appeal court is to determine whether the district court abused its discretion in awarding attorney's fees. *Budanio v. Saipan Marine Tours, Inc.*, 22 Fed.Appx. 708, 711, 2001 WL 1173242 (9th Cir. 2001); *Int'l Bhd. of Carpenters and Joiners of Am. v. G.E. Chen Constr., Inc.*, 136 Fed.Appx. 36, 39, 2005 WL 1253908 (9th Cir. 2005); *Hutka v. Sisters of Providence in Washington*, 102 P.3d 947, 952 (Alaska 2004). A trial court's award of attorney's fees "must be upheld unless a clear abuse of discretion is found." *Hedrick v. Hercules, Inc.*, 658 F.2d 1088, 1097 (5th Cir. 1981).

Abuse of discretion has been defined as, "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1135 (10th Cir. 2010) citing *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1331 (10th Cir. 1996). As this Court has stated, appellate courts must "give the trial court the deference that is the hallmark of abuse-of-discretion review." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 137, 118 S.Ct. 512, 515 (1997).

The Montana Supreme Court correctly applied the abuse of discretion rule. It gave the District Court the deference to which it is entitled. It found that the District Court did not abuse its discretion in awarding attorneys' fees. The Montana Supreme Court noted, "The District Court conducted a careful review of the fee issue and we conclude that it exercised conscientious judgment and did not clearly err in evaluating the evidence or abuse its discretion in approving the fee award." *Tacke v. Energy West, Inc.*, 355 Mont. 243, 254, 227 P.2d 601, 610 (2010).

While acknowledging the District Court did not have the benefit of contemporaneous billing records, the Montana Supreme Court ruled that in this particular case, the District Court had sufficient other evidence to make an appropriate attorneys' fees determination. A review of the transcript of the attorneys' fee hearing amply supports this ruling. (Resp. App. 1b).

The District Court Judge conscientiously carried out her duty. First, she was the only judge throughout the entire case. She presided over all aspects of the case, from the filing of the original Complaint, through the trial, and finally made a determination as to liquidated damages. During this process, the District Judge dealt with a motion to dismiss, motions for summary judgment, motions in limine, discovery disputes, trial briefs, disagreements over jury instructions and the amount of liquidated damages. The District Court Judge emphasized that this was case "hotly contested by Energy West." (Resp. App. 25b).

The District Court Judge was familiar with Respondent's counsel and characterized their work as "above average", "substantial", "time consuming" and "necessary". (Resp. App. 25b). Knowing Respondent's counsel, the District Court Judge determined there was no reason to believe that the affidavits of counsel and their testimony regarding the amount of time expended was inaccurate. Two (2) experts, attorneys well versed in labor law, were deposed and stated the amount of time claimed was not excessive and there was no reason to disbelieve the claimed time.

Not only did the District Court exercise sound discretion in determining the reasonable number of hours expended, it did the same in determining the reasonable hourly rate to be awarded. Respondent's attorneys' requested they be paid at the hourly rate of $250. Petitioner argued the hourly rate should be somewhere between $200 and $220. The District Court ended up awarding the hourly rate of $225.

Finally, Petitioner presented no evidence that the District Court Judge abused her discretion. Respondent argued she had met her burden regarding the reasonableness of the hours claimed and the hourly rate. Both Respondent and the District Court Judge invited the Petitioner to present evidence to the contrary, such as the number of hours Petitioner's attorneys expended or their hourly rates. Petitioner declined to present such evidence. Petitioner even failed to formally request Respondent's contemporaneous billing records.

For the reasons set forth above, the Montana Supreme Court correctly determined the District Court did not abuse its discretion in applying the lodestar

factors and therefore, this Court should deny the Petition for Writ.

B. The Montana Supreme Court correctly enunciated a rule for the production of contemporaneous billing records in fee-shifting cases that is for all practical purposes identical to the rule adopted by federal courts examining the issue.

Prior to reviewing this case, the Montana Supreme Court had never addressed the issue of whether, in fee-shifting cases, the moving party was obligated to present the Court with contemporaneous billing records. As a result, the Respondent did not produce contemporaneous billing records, although they had been kept. The Respondent argued such records were privileged under the work product and attorney-client rule.

The Montana Supreme Court rejected the privilege argument but, as set forth above, ruled that the District Court Judge had ample evidence to apply the lodestar method and did not abuse her discretion in awarding attorneys' fees. Importantly, the Montana Supreme Court then set forth a rule for all future cases regarding the keeping and production of contemporaneous billing records.

The rule adopted by the Montana Supreme Court is essentially the same as the rule urged upon this Court by Petitioner in its Petition for Writ. The Montana Supreme Court stated, "... we strongly urge counsel to keep and provide contemporaneous time records in support of attorneys' fees requests in fee-shifting cases, and we encourage district courts to look

askance at requests not so supported." (Pet. App. 18a-19a).

For all practicable purposes the rule enunciated by the Montana Supreme Court is the same as the rule adopted by the First Circuit. Even Petitioner cites this Court to the case of *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984), wherein the court stated, "... the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in any award or, in egregious cases, disallowance."

Other cases cited by the Petitioner dealt not so much with this rule, as with the nature of the contemporaneous time records. *See, Sussman v. Patterson*, 108 F.3d 1206 (10th Cir. 1997); *National Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319 (D.C. Cir. 1982); *Norman v. Hous. Auth.*, 836 F.2d 1292 (11th Cir. 1988).

As a result of the Montana Supreme Court opinion, Montana attorneys are now required to submit contemporaneous billing records in fee-shifting cases, if they expect to be fully compensated for their work. In this case, Respondent has requested attorneys' fees for Petitioner's appeal to the Montana Supreme Court. In support of that request, Respondent has submitted contemporaneous billing records to the District Court and counsel.

CONCLUSION

In conclusion, Petitioner has failed to present any compelling reason why this Court should grant its Petition. Petitioner has failed to cite a U.S. Supreme

Court opinion that was not followed by the Montana Supreme Court. Petitioner has not shown a split of authority in circuit or state courts requiring intervention. Petitioner has not shown how the rule adopted by the Montana Supreme Court is significantly different than that adopted by other courts. Finally, Petition has failed to show that the District Court abused its discretion in awarding attorneys' fees, requiring this Court to intervene.

Respectfully Submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF MONTANA

DELORES TACKE,	)
	)
Plaintiff/Appellee	)
	)
-VS-	)
	)
ENERGY WEST, INC.,	)
	)
Defendant/Appellant	)
	)

TRANSCRIPT ON APPEAL
PLAINTIFF'S MOTION FOR
ATTORNEY FEES HEARING

APPEAL FROM

THE DISTRICT COURT OF THE EIGHTH
JUDICIAL DISTRICT IN AND FOR
THE COUNTY OF CASCADE

THE HONORABLE JULIE MACEK PRESIDING

Transcript Prepared By: Sandra M. Francetich
Official Court Reporter

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MONTANA EIGHTH JUDICIAL DISTRICT,
CASCADE COUNTY

CAUSE NO. BDV-05-1064
BEFORE THE
HONORABLE JULIE MACEK

DELORES TACKE,	)
	)
Plaintiff,	)
	)
-VS-	)
	)
ENERGY WEST, INC.,	)
	)
Defendant	)
	)

PLAINTIFF'S MOTION FOR ATTORNEY FEES HEARING

Cascade County Courthouse
Great Falls, Montana

JULY 21, 2009

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THE COURT: You may be seated, thank you. All right, good morning. This is the time that's been set In the Matter of Tacke versus Energy West in BDV-05-1064 in regards to the issue of attorney fees. And I have received all of your briefing, have read it as well as your case citations. However, I'll allow anyone to make whatever oral arguments you would like to do so today.

And Ms. Best, since this is your motion, I'll let you begin here.

MS. BEST: Thank you, Your Honor.

I'm going to try to be brief because I know you have read all of this and read the Affidavit. The only thing I would like to -- not the only thing, the one thing I would like to do is swear myself and Howard in to testify to the truthfulness of the Affidavits we've submitted. And also tell the Court about what we've incurred since that time. So, if you don't mind, I'll just be sworn as well as Howard.

THE COURT: All right, that would be fine.

(Whereupon, the witnesses were sworn.)

MS. BEST: And Your Honor, is it okay if we testify from here?

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THE COURT: You're fine, thank you.

MS. BEST: Thank you. I just want the Court to know that the Affidavit that I submitted is true and accurate and states fully the time that I expended and the costs incurred up until the time of that Affidavit. Since that time, I have incurred an additional 19.5 hours of time at $250 an hour, which by my math, works out to $4,875 plus the time required for this hearing and preparation for this hearing, which I anticipate will be one hour plus the time expended at this hearing at $250 per hour.

And then, I'd like to submit, as an exhibit, the bill from our expert Mike Molloy for $4,372.10 for his expert testimony. And ask that that be made a part of the record. And we can just call that Exhibit A to this hearing.

THE COURT: "A"?

MS. BEST: Yes, thank you.

THE COURT: All right, that motion will be granted.

(Whereupon, Plaintiff's Exhibit A was admitted.)

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DIRECT EXAMINATION

BY MS. BEST:

Q. Howard, would you like to -- let me just ask you this: Is the Affidavit that you submitted true and accurate?

A. Yes, it is.

Q. And can you tell the Court how much time you've expended since that time, approximately?

A. About five hours is all.

Q. And do you have any other costs that you've incurred since the time of that Affidavit?

A. None that are not mentioned in my previous Affidavit.

Q. Thank you.

MS. BEST: It's possible, Your Honor, depending on what other issues come up that Mr. Strause may need to testify again.

What the Court has in its file in addition to the briefing and Affidavit that the Court has already reviewed are the -- is the testimony in videotaped form and also in transcript form of Mike Molloy, who was the Plaintiff's lawyer, employment expert, who's done a significant number of plaintiff's cases in wage an hour matters. For the Court's consideration,

he testified that he reviewed the entire file; he also talked to

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counsel, and he's familiar with the rates charged by lawyers who do the kind of work that Mr. Strause and I do, not generically, the lawyers who practice in Great Falls, but the plaintiff's lawyer who do the kind of work we do on the contingent fee bases.

He testified that $250 an hour is reasonable. Mr. Robinson, who is the expert, who was hired by Energy West, testified that he does not dispute that the number of hours that we have expended is reasonable. Mr. Molloy, of course, also testified that the number of hours is reasonable. So, the only issue before the Court, Your Honor, is whether or not the rate that we are claiming is reasonable.

I know the Court is familiar with these factors, but I wanted to make sure that the focus is where it belongs. Mr. Molloy testified that the novelty and difficulty of the legal and factual issues involved justified the rate, as did the time and labor required to perform the services, as did the character and importance of the litigation, the result secured by Mr. Strause and me, the experience, skill, and reputation of both Mr. Strause and me, and the fees customarily charged for similar legal services of the time and place were the services were rendered, as well as the ability that the clients pay for the services and

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the risk of no recovery.

Mr. Molloy testified at some length about the fact that this kind of case, as the Court knows, is the kind of case where plaintiff's counsel takes them not knowing whether their going to recover any dollars at all, that is a significant and substantial risk, particularly when weighed against the importance of -- as Mr. Molloy pointed out -- advancing the law for, not only this company and employees of this company, but also companies similarly situated, energy companies with employees like Delores Tacke.

There is a significant risk of not recovering, there is also a significant delay, as this Court recognizes, I'm sure, in this case, for example, where we have yet to be paid. And this case was filed much in advance of the trial in November of 2008. So, that is the reason why -- and I think that is where the core of the dispute in this case is -- you have defense lawyers who are paid whether they win or they lose and I would point out, Your Honor, that the Defense has not even considered providing to the Court, apparently, the amount of dollars it has paid to its attorneys.

They are paid, win or lose; they are paid regularly. Mr. Robinson concedes that, that is a significant difference. And so, where Mr. Robinson

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compared lawyers who -- by the way, do not have a similar practice to ours in any way, none of the lawyers who were talked to by Mr. Robinson have a similar practice as ours -- Mr. Robinson admits he did not talk to lawyers such as Tim Kelly, such as Larry Anderson, such as Mike Molloy, who have a similar practice in every respect to Howard Strause and

myself. Instead, he talked to hourly rate lawyers who have an insurance practice, lawyers who have a Workers Compensation practice, which is significantly different. Or in one case, a lawyer who represents primarily unions, again on a billable rate.

Those are not comparable situations. Mr. Molloy is the only person, besides Mr. Strause and myself, who was able to testify about comparable practices, comparable cases. I would point out, in addition, that Mr. Robinson testified that in a recent case -- and by the way, the only case he was able to point to specifically in which he has represented a plaintiff in a wage case was 16 years ago and he did not tell us about the rate in that case. But, in a recent case in which he was a defense lawyer, he described a self proclaimed expert in labor law who sought an award of $250 an hour, which is the rate we are seeking in this case. And points out that that self-proclaimed

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expert in labor law got $200 per hour. He admitted that Howard Strause and I are not self-proclaimed experts in labor law, but that we're actually highly regarded in this area. I would think that on the basis of Mr. Robinson's testimony itself there is justification for the reasonableness of our fee.

There was some testimony and some argument and some suggestion during the depositions and during the briefing that you've seen by Mr. Higgins and Mr. Selby that this wasn't a complicated case; this case was one that, of course, we should have won and in fact we didn't do very well by getting the verdict that we got.

I think it's important to understand, Your Honor, that not only did we get the verdict we got, the Court recognized that liquidated damages were appropriate and that requires significant proof.

In addition, Your Honor, that laid the groundwork for us to be able to settle a subsequent case for a subsequent period of time, on behalf of Ms. Tacke for roughly equivalent amount of money. I'd also point out that, although they mock the necessity of having two lawyers present for this case and working on this case, Mr. Selby has flown out here from Ohio, they needed an out-of-state specialist to bring in, to try this case. They brought in a high priced, out-of-state specialist

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to try this attorney's fees matter. So, there must be something significant and important about this particular case and more complex than they are suggesting to the Court.

I think that a significant amount of time has been spent in depositions and in briefing to this Court talking about the subject of settlement. It's my view, Your Honor, that under Rule 408 that's irrelevant from the outset. I don't intend to spend a lot of time on that unless the Court is especially interested in it. Every single case involves settlement negotiations before trial. If a case is tried, it means the settlement negotiations didn't succeed. But, I want to tell the Court that if that becomes an issue, we would like to talk about that and I'd like to have some testimony on that because the facts represented to the Court is simply inaccurate and not true. So, I'll leave that to

the Court as to whether you're going to pursue this or not.

I guess, Your Honor, the bottom line in this case is, I think that this should be a relatively simple hearing. The question -- there are two questions to be resolved in attorney's fees cases. The factors that the Court is well aware of need to be applied, they have been applied by the experts and I think Mike Molloy, who

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was the only person who was called as an expert who has the relevant expertise, has testified to the reasonableness of the number of hours; that's questions number one. Don Robinson has testified to the reasonableness of the number of the hours and the Defendant's have not taken issue with the number of hours. So, that issue really is off the table.

The only question is, whether or not our rate, which we claim to be $250 per hour is reasonable. Don Robinson claims that, because he and other defense attorneys get $200 an hour and he will concede up to $215 an hour and are paid regularly with no risk of not being paid whether they win or lose, that plaintiff's attorneys should get the same hourly rate. If that's comparing apples and oranges, many, many courts have recognized that, some of the cases that we've attached to our Affidavits have pointed that out to the Court. And so, our position, Your Honor, is that the Defendant's have simply failed to prove that our claim of $250 per hour is unreasonable.

Thank you.

THE COURT: All right, thank you.

Mr. Selby.

MR. SELBY: Thank you, Your Honor.

I think it is inaccurate to state that the

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Defendant is not challenging the number of hours worked. I think a more accurate statement would be to say that we don't believe that the evidence and the Affidavits that they've submitted setting forth the number of hours that they claimed to have worked in this case satisfies the burden they have. I don't think there is any way that Defense can make a determination as to whether the number of hours they have claimed to have worked is reasonable given they haven't provided any of the detail. Attorney Robinson, the expert -

THE COURT: Let me stop you there for just a minute because I'm interested in this subject. Obviously, the Defense was preparing, attending the same depositions, preparing the same case for trial; you have some idea of the amount of time the Defense put in to prepare this case for trial. So, although the Plaintiff, you know, has the burden of proof and often has to do more work, is there something to suggest in a defense preparation of the case that the hours that the Plaintiff's attorneys are setting forth are out of line in comparison?

MR. SELBY: It would be purely speculation from the perspective of preparing witnesses for depositions,

doing research, you know, range of plus or minus 100 hours. Yes, I'm not saying that this is

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completely out of the ballpark; but, you know, plus or minus 100 hours can be, you know, at $250 an hour, a significant amount of money. And so, you know, the fact that this may be in the ballpark doesn't mean that they've met their burden.

The cases are very clear to state that: "Must support it's request by providing contemporaneously timed effort reflecting for each attorney, the date, the hours expended, and the nature of the work done." There has been nothing submitted along those lines. These -- when you talk about looking at these fees, to make that inquiry, you look at the reasonableness of those entries, you know, one of the issues of duplication of effort.

There are certainly aspects of this case where it was appropriate that they had two lawyers involved. Without seeing a detailed breakdown, we don't know if they had two lawyers researching the same issue, two lawyers doing the same prep work for the same deposition. It's purely speculation as to how that happened. The purpose of having those detailed billing records is to look at those and make those type of appropriate determinations. And the caselaw is clear that the burden is on the plaintiff to submit that information; and they chose not to submit that.

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information. To say whether 403 numbers represents the reasonable hours expended in this case, from our perspective, would be purely speculation. And saying that that's in the ballpark is not saying that's the reasonable number for which they should be compensated. And it's not what the cases say should be compensated. And I think based on the record before this Court, there isn't sufficient evidence to justify the number of hours worked.

With respect to the hourly rate that they are seeking, the expert testimony of Don Robinson has been submitted to this Court as well for consideration. He opines that the hourly rate in this case should be lower than the $250, which the Plaintiff's are seeking. I think that that — if you look at what is reasonable in the community, what has been awarded, what is being charged by other attorneys, and the information he's provided, $250 an hour is not supported.

And I'll note to the Court that the Montana Supreme Court, in a recent case decided earlier this month in July in which Ms. Best was seeking attorney's fees for a plaintiff who was challenging termination by the Cascade County Sheriff's Office in retaliation for supporting an unsuccessful sheriff's candidate, the Court approved it's award based on $220 an hour, in that

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case. So, within the last month, the Montana Supreme Court has said $220 is an appropriate hourly wage for Attorney Best. It's not an overtime case, but it is an

employment related case. I note in that case, based on what was reported in the Montana Law Week Digest discussing the case, that the county in that case did not object to the $220. So, there is, you know, an additional, I guess, evidence from what is a reasonable hourly rate in the community as consider by the Montana Supreme Court. And I think that case was Edwards versus the Cascade County Sheriff's Office.

With respect to the last issue and with respect to the settlement, I guess the fact that the case didn't settle isn't the basis for the position. It is that their demands early on in the case, during the first months of this case, the demand which they had made was for $155,000 plus attorney's fees. The problem that you have with a demand that like is the $155,000 they were seeking in settlement was actually more than they could have received in their best case scenario. The damages that they came in and ask the jury for were between $60,000 and $70,000 in actual damages for three years, it would have totaled in that 60 plus thousand dollar range, double that in liquidated damages, you get between 130 and 140; they're asking for 155.

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By asking for more than they could get if they won the case, they put it in a position where the case must go forward and therefore inflating the attorney fee request. So that's the basis of the argument. That it wasn't that the case didn't reach a settlement, it's that the figures that were being sought exceeded what could even be recovered.

And I think those are really the three issues we have here. One, I don't believe they've established the sufficient record to support a reasonable award of attorney's fees based on the information they've provided. They haven't met what the caselaw says is there burden to provide. I think the hourly rate they're seeking, $250 an hour, if the Court determines that some award is appropriate, it is too high and I think no further than what the Montana Supreme Court has said earlier this month. And I think with respect to that settlement posture that those are the three issues we have with respect to attorney's fees.

THE COURT: All right, thank you.

Ms. Best, do you want to respond?

MS. BEST: Thank you, Your Honor.

First of all, at page 37 of Mr. Robinson's deposition, line 16, I asked:

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"Right, and I just want to be clear with the Court, you are not testifying that the number of hours we have claimed are unreasonable, correct?

"Answer: Correct."

That's their expert, that's the only evidence. There is not a court in this State that I'm aware of, Your Honor, that has required plaintiff's counsel to produce billing and time records. And Mike Molloy testified and I challenge them to come up with a plaintiff's attorney who will testify in the contrary, and certainly

not submitted this to the Court, that plaintiff's counsel in this state, at least, don't do that. We end up reconstructing, most of us, if not all of us, prefaced on a contingent fee basis and that's how hourly rates are considered by courts.

The only question is whether the hourly rate and our claims are reasonable. They have already conceded in their briefing and through their expert that our hours are reasonable. Once again, inaccurate and incomplete information has been provided to the Court. The Edwards case was a 2004 case, 220 was what was claimed because that was the rate at the time that was claimed. Some water has a passed under the bridge since that time and the rate has increased for all of us and Don Robinson recognized that in his Affidavit

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The settlement commentary provided by Mr. Selby, again, is not complete, Your Honor. I'm still not certain that it's relevant. If the Court wants to hear on that point from us, we can provide some sworn testimony. I don't see how it goes to any of the factors that the Court should be considering as to what the appropriate hourly rate should be, but Mr. Strause, in particular, I think can provide some testimony that can make the facts more clear about what happened during those settlement negotiations.

I would make one point, however. The amounts that were being discussed were amounts to the locally -- not only the claim that this Court presided over, but also the subsequent claim, which was settled because of the verdict in the first case. So, I think that if we're

going to be making those types of aspersions, we want to be entirely and completely accurate with the Court.

Judge, do you want to hear any testimony on the settlement that you haven't --

THE COURT: I think that only -- there was one case that talked about settlement position and in that case, the Court concluded that the parties had made a completely -- I can't recall the exact language of it -- but they basically said that they had made -- the

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claims submitted was a specious settlement claim that it was out of the ballpark of what the claim could have ever potentially been worth. And the judge then went on to tirade plaintiff's counsel at what a terrible job they had done during the trial and how the verdict was exactly what the judge thought it was going to be at the end. I don't think I have those types of facts here. And from my perspective, I have not seen anything that would indicate to me that this case fits within the parameters of that discussion.

And so, I don't think I need to hear more as far as the settlement of the case is concerned. There are many, many factors that go into settling cases and negotiations and mediation for process of settling a claim; that frankly, often times, when the case is settled and the jury comes in, there's no semblance of comparison between the two. Often times people -- plaintiffs leave hundreds of thousands of dollars on the table and often times the defendants wished they would have settled for what they had the opportunity to settle for. So, I think the only relevance in a

particular case, the Court feels that they're basically that the whole process of trying a case was a sham in order to orchestrate large attorney fees, I think that the Court may be able to consider

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that as a factor, but having watched this case from the beginning, I don't think that's the scenario that this case has to look at, as far as the trial in this matter. So, I don't think I need to hear anything more about the settlement negotiation processes.

MS. BEST: Thank you, Your Honor.

THE COURT: I guess the only other thing, Ms. Best, just for clarification of the record since you and Mr. Strause are under oath. In regards to this issue of having two attorneys attend certain depositions, but more in the realm of research, can you indicated to the Court that there was no duplication of effort between you and Mr. Strause in regards to preparation for hearings and writing of briefs and research between the two of you.

MS. BEST: Yes, Your Honor, I can unequivocally tell you that and I'm glad you brought that up. You had the opportunity to watch us during the settlement of the instructions, you had the opportunity to watch us as we examined witnesses and I think it's fair to say that we spent our time wisely, we were efficient, we didn't waste the Court's time, we tried to be tight with our arguments, tight with our examinations, and tight with our presentations to the Court; that's exactly how we spent our time when we

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weren't in the courtroom. We did collaborate. If one of us wrote a draft, the other one would look at it and comment or edit, but we're both old enough, we both have enough gray hair that we're not going to just do the same things for fun; we have enough to do.

THE COURT: All right, thank you.

MR. SELBY: Your Honor?

THE COURT: Yes, go ahead.

MR. SELBY: One additional issue: Just for the record with respect to the settlement issue. I would like to just proffer a May 19th, 2006 letter from Howard regarding settlement.

MS. BEST: A May 19th what?

MR. SELBY: Just like to proffer it for the record. There's a copy here.

MS. BEST: Well, then I think we probably better ought to put all the correspondence in, if the Court's going to accept that.

THE COURT: Well, I'll let you decide what you want to do here, but it appears, at least, if you're going to -- none of this happened in a vacuum, there was, I think, a litany of paper going back and forth here.

MS. BEST: I think this is just irrelevant under Rule 408, Your Honor. And we would ask this Court

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not to consider it.

MR. SELBY: And Your Honor, also one clarification on Don Robinson, his testimony. Later in the deposition at page 49, he was asked:

"You aren't telling the Court that you think my claim for the number of hours that I have done is unreasonable or overblown or not credible, are you?"

And he answered:

"I'm not saying it's not credible at all, I just think there is no way to know or have a basis for accuracy, which I think the Court should have some basis of accuracy for the amount of work claimed. And so, you may have actually submitted documentation, I don't know, I haven't seen it, and I didn't see any after your Affidavit."

MS. BEST: What page is that?

MR. SELBY: Page 49, lines 11 through 22. Just to clarify that he wasn't saying he didn't object to the hours, just he had no basis for making a determination.

MS. BEST: Well, let me just go on to page 50 then, Your Honor. Okay, I want to know if you're --

COURT REPORTER: Please read it slower.

MS. BEST: Page 50, line 19 -- and I

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apologize for this, it's just very uncomfortable for us to have to prove to the Defense lawyers that we're credible or believable.

"Okay, I want to know if you're telling the Court if I am not to be believed?

"Answer: No, I would never say that."

MR. SELBY: And Your Honor, I just want to clarify: We are not -- we're not saying that they're not credible and that they didn't work the hours they're saying, but simply saying we worked 403 hours doesn't establish that those hours were reasonably expended in response to the litigation. That it's not just the number of hours the attorneys worked, it's the number of hours they reasonably worked and without the detailed records that the courts -- that the cases detail, there's no way to make a determination of whether that total number of hours was reasonable. So, that's the position.

MS. BEST: Well, since it's our burden, Your Honor, I'll ask the for the indulgence of the last word.

THE COURT: Go ahead.

MS. BEST: I think that's where our reputation comes in and the Court is well aware of that. And the Court has had an opportunity to observe how

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reasonably we expended our time during the trial and we ask that the Court apply that observation to making a determination about the fees in this case.

THE COURT: All right, thank you.

As I indicated to you, I did read everything that was submitted to the Court, the Affidavits, the arguments of counsel, and other cases that you've cited to me and I want to be able to -- although it won't be necessarily eloquent -- be able to give you a ruling today from the bench so that you can move forward here.

The requirements here are quite straight forward as far as how they're set out. However, the Devil is in the details. And in this case, the Court has to make specific findings to determine what is a reasonable attorney fee. There is no question that the Plaintiff was, in fact, the prevailing party and as such, they're entitled to reasonable attorney fees pursuant to statute. And the issue of reasonableness is basically one for the Court to determine. The general accepted standard for a starting determination of a reasonable fee is to take the number of hours reasonably expended and multiply that by a reasonably hourly rate, which is then known as the "Little Star Fee." [sic] Couldn't find anywhere that came up with why they termed it that way, but that's the name that they have given it. And

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the Court's required to determine whether the entire "Little Star" [sic] amount is reasonable by considering

seven general factors and I'm going to walk through those best that I can here based on the record.

The first is the amount and character of services rendered and the second is the labor, time, and trouble involved and those two are somewhat interchangable. I tried to distinguish between the two as much as I could. I looked at -- as far the labor, time, and trouble involved, I went through the court file in detail and ferreted out the services that were rendered here on behalf of the Plaintiff's Counsel. Obviously, they began by researching and formulating and drafting a Complaint. And then, formulated and prepared extensive discovery requests; prepared several affidavits in this matter. There were motions that were researched, formulated, and drafted including summary judgment motions that went to hearing and motions in limine; multiple motions in limine, that were put together. They were obviously researching, formulating, and preparing responses to all of the Defendant's briefs, which there were several in this case and Defendant's motions in limine. There was a trial brief that was researched and drafted; a pretrial ordered. There was also jury instructions; and consultation with

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experts preparing for and presenting at the pretrial hearings in this case and post-trial hearings, which included liquidated damages hearing; and this hearing as well. In addition, there was trial preparation and -- preparation. There was a jury trial that was four days long and the time involved in conducting that jury trial. And the time for today's hearing and the post-trial proceedings that we've had as well.

In regards to the type of case this involved and the time and trouble involved, obviously this case was hotly contested by Energy West. There was a great deal of trial preparation put into this case.

The type of character, I guess, of services rendered would be where the Court would look at how its assessment of Counsel's performance fit within this matter. The Court does find that the briefing and argument of Counsel was -- I would put it in the above average category; and frankly, I would do so on both sides of this matter. This was a very well-prepared and well-litigated case, but the Court is to look at performance of Plaintiff's Counsel at this hearing. And I think the services performed by Counsel were substantial and time consuming and necessary in order to advance the Plaintiff's case here.

I don't find that there was -- that I have

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many, many cases where counsel file 12 briefs when two would suffice and this wasn't one of those cases. I didn't find any issue of failure to use time wisely or find any briefs that were not necessary to promote the Plaintiff's viewpoint of the case.

As far as the additional issues that are important to the amount and character of the services rendered, this was a labor law case. The Plaintiff's had taken the case on a contingency case basis. And as far as the circumstances, they were against a major employer with significant resources to bear of the case at hand.

The Court's also required to consider the character and importance of the litigation and the amount involved or the value of the property effected. Certainly, in terms of what types of cases, all people in this room have seen, this is not a huge money case, but in relative terms to the wage that the Plaintiff received. The eventual judgment in this matter was approximately $70,000, which is more than an entire years wages to this particular Plaintiff. So, to the Plaintiff involved, this was a substantial amount of money and a substantial recovery to her.

In addition to that, the courts have recognized that in regards to the prosecution of wage

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claims that the service provided by counsel, in the general terms, in these types of cases is important and has been likened to a private attorney general function that counsel serves to generally safeguard the rights of the independent worker. The courts have also recognized the fact that, generally speaking, the types of persons that are seeking wage claim recovery do not have the funds available to hire counsel on an hourly basis and are -- by necessity, seek out counsel that will provide them a contingency fee services, without having to front money in order to get their case into court.

And so, as to the character and importance of the litigation, I think that the general -- there's some general import to wage claim cases on behalf of the general public and certainly, to this particular Plaintiff. There was a great deal of importance to her.

The professional skill and experience called for in this matter: There's been discussion about how complex this litigation was or was not. Certainly, this is a concentrated area of the law in which few will wage into. There are very few attorneys in Great Falls, even the State of Montana, that specialize in this area of the law. The Court's experience with Ms. Best and Mr. Straus is that they are one of the few firms and individual attorneys that will, in fact, take these

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types of cases; and that frankly, make a significant part of their practice in this area of the law. This is, I think, a specialized area of the law that has some complex intermingling of state and federal legislation and regulation. And so, I don't think it's the type of case that any general practitioner can become involved in; or if they do, they're going to have a fairly steep learning curve in order to do so successfully.

The Court is also required to consider the character and standing in the profession of the attorneys involved. And as indicated by Mr. Molloy and also set forth in the Plaintiff's Affidavit, Ms. Best has approximately 25 years of experience and has specialized in this area of the law; is highly respected in that regard; has served on the Board of Trustees of Montana Trial Lawyers, is past president of that association; is chairman of the board of the Montana Labor Appeals.

Mr. Straus has been in practice even longer than that and also has specialize in this area of law; has the same type of credentials to bear as Ms. Best. And so, both of the Counsel in this matter are, I think, of

upmost regard and are probably some of the most skilled counsel that the Plaintiff could have hired to represent her in this claim. The Court has nothing to

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indicate that they duplicated any effort in this matter and certainly has no cause to believe that either one would present to this Court an affidavit of attorney's fees that is not substantiated in their practice before this Court.

The Court also concludes that the attorneys did provide skillful and substantially above average representation in this matter. And as far as that factor, I think that that is more than provided for.

The last is the result secured. The judgment in this matter was approximately $35,000. The liquidated damages provision bumped that up to approximately $70,000; and as indicated, that amount is substantial to Ms. Tacke. And according to, also the testimony of Mr. Molloy, a reasonable and successful verdict.

The Defense, essentially, had a couple of arguments. One was that the Plaintiff should be required to substantiate the amount of their fees by specificity, as is common with firms that, for example, provide defense work. And although I think that, certainly, that may be helpful at the point in time that the attorneys come in at the end of these cases and ask for compensation, I don't believe that the caselaw goes so far as to indicate that that is an essential

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requirement. What the cases say is that the plaintiff can provide testimony and evidence in the form of testimony and affidavit to indicate the amount of time that they worked and what they were doing.

The record here, that I've gone through as far as what was filed within the court file, substantiates a significant amount of time that the Plaintiffs have spent. The Court also has personal knowledge of the four days of jury trial plus what would be, at least, several days of pretrial hearing and preparation for those hearings.

And so, in looking at the totality of the evidence before this Court, the Court finds -- and I do have sufficient evidence to make a determination as to whether or not the request for the hours that have been submitted here are in fact reasonable. And the determination of the Court is that I believe that the claim for hourly -- for the hours that have been asserted here has been a reasonable claim based on the evidence that is before the Court.

The next issue the Court has to decide is whether or not the hourly rate that's been requested is reasonable. I have considered the testimony of Mr. Robinson and I've also considered the testimony of Mr. Molloy; and frankly, the experience from the bench

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as to the types of attorney fees the Court sees submitted here. I think that the general premise that Defense Counsel and general practitioners charge

approximately $180 to $215 per hour is probably in the ballpark of reasonableness as to what the going rate is for those attorneys in that type of practice.

The law does allow for the Court to consider the fact that plaintiff's counsel, who takes cases on a contingency fee basis, has significant risks that defense counsel or anyone that's billing hourly does not have to forebear; that is that plaintiff's counsel takes a case on a hope and a prayer that they're going to see the case through either settlement or through verdict that's going to make their time worth it's while. And they take a risk that the costs that are expended, which are substantial in the cost of depositions and time that they take to prepare are going to come to fruition. They also have to forebear the recovery of fees for, in many cases unless there's an early settlement, a significant period of time, which ends up being years in many cases -- the Court will note that this is a 2005 case, it's now 2009, so we're four years down the road and Plaintiff has yet to see a penny from this case.

The Court, because of those circumstances, has the opportunity to indicate that that risk is worth

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something. The question is, how much of an increase above the normal fees of recovery is that worth. There have been several cases that have been pointed out to me that have been in the 225 to 250 range for settlement of attorney fees by the Court. The recent case of Edwards, although that was something that was stipulated so it doesn't help the Court a lot because the Supreme Court wasn't assessing the issue of attorney fees, that was a rate that was stipulated by

the county and the government entities involved as a reasonable rate for this same particular attorney.

The Court notes that there have been several other courts recently that have made the determination of attorney's fees in regards to Ms. Best and in the area of $225 have allowed that type of recovery.

In assessing all of the factors this Court has to assess here, the Court does find that, taking into consideration the testimony of both experts and all additional information that this Court has to bear on the subject, that the reasonable attorney fee, hourly rate here, is that this Court finds to be reasonable is the amount of $225 per hour.

The Court then -- I have not done the math here because frankly I'm not good at it and especially not good at it under pressure. And so, I will apply the

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$225 an hour to, it's now 9:50 so this hearing has gone close to one hour, so the -- as I understand it, Ms. Best, you can correct me if I'm not right, the original request on the Affidavit was 405 hours plus 19.5 hours and I'm going to round that out to an additional 20.5 hours for Ms. Best and Mr. Strause at 397 -- is that right, 397.14 hours.

MR. STRAUSE: I think that's right. Ms. Best, was it down -- I wasn't sure.

MR. STRAUSE: It was.

THE COURT: All right, 397.14. And Mr. Strause, you indicated you had an additional --

MR. STRAUSE: Five hours.

THE COURT: Five hours. I'm including the hearing. I will round you up to the .14 so that that 398 plus 5.

All right, and in regards to the issue of costs involved: Ms. Best, do you have a total for the Court that I need to put into the order? I have those from Mr. Molloy.

MS. BEST: I know we filed them.

THE COURT: All right, that's fine, I can get it. In fact, I know I have it attached here. I will get it to you and get a summary order out to you, hopefully by the end of today so that you can go forward

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here however you wish.

And with that said, I want to personally thank all of you for your professionalism in this trial. It's not something that the Court should have to thank people for; but frankly, I find it refreshing and this was an interesting case to be tried and I thought it was tried extremely professionally on both parties behalf and I want to personally thank you for that.

All right, thank you.

MR. SELBY: Thank you.

MR. STRAUSE: Thank you, Your Honor.

MS. BEST: Your Honor, before we go off the record, there were costs in the previous record -- in the previous order that were already addressed.

MR. SELBY: They've already been approved by the Court.

THE COURT: All right, so --

MS. BEST: The Mike Molloy costs have not yet been addressed.

THE COURT: Is that the only additional, just so I'm right?

MR. STRAUSE: I had in my Affidavit, I put my costs on that also.

THE COURT: Okay. So between the Affidavit and Mike Molloy's I should be able to get -- correct

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that.

MS. BEST: Yes, Your Honor.

THE COURT: All right, I will do that.

MS. BEST: Thank you, Your Honor.

(Whereupon, the Hearing was concluded at 9:55.)

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CERTIFICATE OF REPORTER

STATE OF MONTANA)
) ss.
County of Cascade)

I, Sandra M. Francetich, Court Reporter and Notary Public for the State of Montana, residing in Great Falls, Montana, do hereby certify:

That the foregoing transcript is a true and accurate record of the proceeding given at the time and place hereinbefore mentioned;

That the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription.

I further certify that I am not an attorney nor counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of this the 26 day of September, 2009.

/s/ Sandra M. Francetich
Sandra M. Francetich
Court Reporter
Notary Public, State of Montana
Residing in Great Falls, Montana.
My Commission expires: 08-28-2011

(Seal)